

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Delali Madison	Team: Bias Squad #01	CCRB Case #: 202306511	<input checked="" type="checkbox"/> Force <input type="checkbox"/> Discourt. <input type="checkbox"/> U.S. <input checked="" type="checkbox"/> Abuse <input type="checkbox"/> O.L. <input checked="" type="checkbox"/> Injury
Incident Date(s) Sunday, 06/18/2023 8:16 PM	Location of Incident: northeast corner of Lenox Avenue and West 143rd Street	18 Mo. SOL 12/18/2024	Precinct: 32
Date/Time CV Reported Wed, 06/28/2023 4:06 PM	CV Reported At: IAB	How CV Reported: E-mail	Date/Time Received at CCRB Sun, 07/16/2023 11:42 AM

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. PO Kevin Mcdermott	02115	968628	032 PCT
2. An officer			

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. PO Jimmy Infanzon	12930	971485	032 PCT
2. PO Dylan Damalio	08498	970474	032 PCT
3. PO Jennifer Garcia	05765	968426	032 PCT
4. PO Eboni Walker	23812	970306	CAB COD
5. PO Denis Cekic	11429	953738	032 PCT
6. PO Chantal Williams	21849	963335	CAB COD
7. DT3 Joseph Luongo	00490	958848	MNROBSQ
8. PO Jamar Parchment	05782	973134	032 PCT
9. SGT Christopher Fulgieri	05531	949862	QN SU CRT
10. PO Hashaam Shahzad	19587	975175	032 PCT
11. PO Ngagne Dieng	30339	975436	032 PCT
12. SGT Pablo Taveras	02575	943862	NARCBMN
13. SGT Richard Herrerabayas	01663	952848	032 PCT

Officer(s)	Allegation	Investigator Recommendation
A . PO Kevin Mcdermott	Abuse: Police Officer Kevin McDermott stopped § 87(2)(b)	
B . PO Kevin Mcdermott	Abuse: Police Officer Kevin McDermott frisked § 87(2)(b)	
C . PO Kevin Mcdermott	Abuse: Police Officer Kevin McDermott searched § 87(2)(b)	
D . An officer	Force: An officer used physical force against § 87(2)(b)	
E . PO Kevin Mcdermott	Abuse: Police Officer Kevin McDermott detained § 87(2)(b)	
F . PO Kevin Mcdermott	Abuse: Police Officer Kevin McDermott failed to explain to § 87(2)(b) the reason for a law enforcement activity.	

Officer(s)	Allegation	Investigator Recommendation
G . PO Kevin McDermott	Abuse: Police Officer Kevin McDermott took law enforcement action based upon actual or perceived race.	

## Case Summary

§ 87(2)(b) an attorney retained on behalf of § 87(2)(b) filed this complaint with IAB on June 28, 2023. IAB forwarded the case to the CCRB, where it was received on July 17, 2023 (BR 01).

On June 18, 2023 at approximately 8:16 p.m., § 87(2)(b) was walking in the vicinity of Lenox Avenue and West 143<sup>rd</sup> Street in Manhattan when Officer Jimmy Infanzon ( “PO Infanzon”) and Officer Dylan Damalio ( “PO Damalio”), all of the 32<sup>nd</sup> Precinct Neighborhood Coordinating Officer Team, stopped § 87(2)(b). PO Infanzon and PO Damalio stopped § 87(2)(b) after receiving a description of § 87(2)(b) from PO Kevin McDermott ( “PO McDermott”) of the 32<sup>nd</sup> Precinct Neighborhood Safety Team (**Allegation A: Abuse of Authority**, § 87(2)(g)). PO McDermott frisked and searched § 87(2)(b) (**Allegation B-C: Abuse of Authority**, § 87(2)(g)). An officer used force to restrain § 87(2)(b) during the frisk and search (**Allegation D: Force**, § 87(2)(g)). PO McDermott did not recover anything from the frisk and search. PO McDermott then extended the detention of § 87(2)(b) by requesting his identification (**Allegation E: Abuse of Authority**, § 87(2)(g)). PO McDermott never provided § 87(2)(b) with an explanation of why he was stopped (**Allegation F: Abuse of Authority**, § 87(2)(g)).

§ 87(2)(b) alleged that the officers’ law enforcement actions during this interaction were racially motivated (**Allegations G: Abuse of Authority – Bias-Based Policing (Race)**, § 87(2)(g)).

The investigation received body-worn camera footage (BR 03).

This case was originally assigned to Investigator Benjamin Shelton. This case was transferred to the Racial Profiling and Biased Policing Unit on August 17, 2023, and reassigned to Investigating Attorney Fellow Delali Madison.

## Findings and Recommendations

**Allegation (A) Abuse of Authority: Police Officer Kevin McDermott stopped § 87(2)(b)**

**Allegation (B) Abuse of Authority: Police Officer Kevin McDermott frisked § 87(2)(b)**

**Allegation (C) Abuse of Authority: Police Officer Kevin McDermott searched § 87(2)(b)**

### *Statement*

On August 2, 2024, § 87(2)(b) provided a statement to the CCRB (BR 02).

On June 18, 2023, at approximately 8:16 p.m., § 87(2)(b) who is 16 years old, walked from Fifth Avenue and West 142<sup>nd</sup> Street with friends to the east side of Lenox Avenue at West 143<sup>rd</sup> Street in Manhattan, approaching a park where numerous Father’s Day barbecues were taking place. He noted that approximately one hour prior, he and his friends had been walking in the vicinity of Lenox Avenue and West 143<sup>rd</sup> Street with friends when he had noticed a group of officers near the cookouts there. He identified his friends as § 87(2)(b) (17 years old), § 87(2)(b) (15 years old), and § 87(2)(b) (13 years old). § 87(2)(b) was wearing a blue du-rag, gray Champion pullover sweater with a large central pocket in front over a white t-shirt, light blue jeans with front and back pockets, and white-and-gray Jordan sneakers. He had nothing in his sweater pocket, and had an iPhone 14 and one key on a small plastic keychain in the pocket of his jeans, though he did not recall specifically which of his jeans pockets contained these items (BR 02).

As § 87(2)(b) walked past the park, he observed eight to twelve uniformed officers walking in the same direction about 20 feet ahead. § 87(2)(b) looked at the officers as he went by, making eye contact with PO McDermott, but he described this as nothing abnormal and just normal eye contact one might make when passing someone on the street. He stated he may have hiked his pants up on his hips as his pants tend to sag and is a normal habit from him, but did not recall any specific movements he made near officers other than speaking on the phone and walking with his friends. § 87(2)(b) and his friends continued walking for a few steps before PO McDermott used two hands to push him on his back and then grabbed the back of his sweater (**BR 02**).

He turned and reached for the hand grabbing his sweater and saw PO McDermott, and PO McDermott swatted his hand away. § 87(2)(b) saw additional officers from the group on the corner approaching. They formed a circle around § 87(2)(b) and blocked his friends from seeing what was going on or approaching him. § 87(2)(b) repeatedly asked why officers were stopping and grabbing him, what they were doing, and he told them to get their hands off of him (**BR 02**).

After the group of officers circled around him, § 87(2)(b) felt multiple officers holding his torso and lifting his arms up. The officers did not say anything or issue any orders. Two officers identified by the investigation as PO Infanzon and PO Damalio lifted § 87(2)(b) arms away from his sides. § 87(2)(b) repeatedly attempted to move his arms and swat the officers' hands away, but was unsuccessful. PO McDermott stood in front of § 87(2)(b). He felt hands going up both sides of his shirt and pat his sweater around his hips up to arm pits, as well as lift his sweater up to feel his t-shirt under the sweater. An Officer was on his left side assisting with the frisk and § 87(2)(b) felt him grabbing his belt and/or patting the left side of his waistband. § 87(2)(b) tried to move away and grab the hand but an officer he described as a light-skinned male officer hit his left hip with a palm or fist, so § 87(2)(b) stopped resisting. PO McDermott then pulled the jeans away from § 87(2)(b) waist, reached his hand into his underwear down his thighs, and took his hands out. An officer the investigation identified as PO McDermott patted the outside of his legs down to his ankle. PO Infanzon and PO Damalio grabbed, pushed, and pulled § 87(2)(b) throughout, holding him in place during the stop. The officers never explained the reason for the stop, frisk, or search, but § 87(2)(b) assumed they were looking for a firearm or other weapon since they seemed to be focused on checking his shirt and waistline. Once officers had checked his legs, the officers still surrounded him and PO Infanzon and PO Damalio held him on either side of his body (**BR 02**).

#### *BWC Video Evidence*

The investigation obtained video evidence from the BWC of Police Officer Jennifer Garcia, a witness to the incident (**BR 10**). § 87(2)(b) enters the frame at approximately 0:36 minutes in PO Garcia's body-worn camera. He is walking with three other individuals, who appear to be young Black men. § 87(2)(b) positioned second from the right, is wearing a blue du-rag, a gray Champion hoodie, distressed light blue jeans, light-colored sneakers, and is holding a cell phone in his hand. At 0:40 seconds, § 87(2)(b) grabs his crotch area. The contact with his crotch lasts for less than one second and occurs before § 87(2)(b) crosses West 143<sup>rd</sup> Street or passes the group of officers. At 00:42, § 87(2)(b) and the group are seen crossing West 143<sup>rd</sup> Street and Lenox Boulevard. Around the 00:52 mark, PO Infanzon runs up behind § 87(2)(b) and grabs his left forearm with both hands. At 00:58, PO Damalio approaches and grabs § 87(2)(b) right wrist. Both officers lift § 87(2)(b) arms. By 01:07, PO McDermott reaches for § 87(2)(b) waist, feels around his waistband with both hands, lifts his sweatshirt, places his hands in § 87(2)(b) front pockets, and briefly checks his backside again. At no point does any officer hit § 87(2)(b).

§ 87(2)(b) approach to the intersection of West 143rd Street and Lenox Avenue is also captured between 0:29 and 0:50 minutes in Police Officer Felixis Reyas' BWC (**BR 11**), from approximately 0:40 to 1:05 in the recording and in the BWC of Police Officer Eboni Walker (**BR 12**), and between 0:46 and 1:00 on PO Chantal Williams' BWC (**BR 13**).

PO McDermott's approach is depicted in his BWC footage (**BR 14**). From 0:00 to 0:35, PO McDermott is seated in the rear passenger seat of a police vehicle. The vehicle parks several car-lengths from the intersection of Lenox Avenue and West 143<sup>rd</sup> Street and then walks to and across the street to where other officers have stopped § 87(2)(b).

PO Damalio's BWC (**BR 15**) depicts officers' approach of § 87(2)(b) starting at 0:23 minutes in the recording. No bulges are visible on or under § 87(2)(b) clothing near his hooded sweatshirt, natural waist, or the waist of his pants. At 0:33 minutes, PO McDermott places his right hand on § 87(2)(b) chest, and then reaches with his left hand to the area of § 87(2)(b) buttocks. PO McDermott lifts the sweatshirt, uncovering § 87(2)(b) underwear-covered waist and the waistband of his pants. At 0:37, he holds and moves the waistband of the pants. At 0:38, he places at least one finger of his left hand into § 87(2)(b) pants pocket.

Two still frames taken from the BWC's of PO Damalio and PO Infanzon (**BR 42**) depict close-up frontal and profile views of § 87(2)(b) at the time of the stop. § 87(2)(b) is wearing a hooded sweatshirt with no bulges or items producing weight in the front pouch pocket. His jeans are not voluminous, and the waistband of the jeans are lower than his natural waist. No bulges or areas where potential bulges might appear are visible in any of his clothing.

#### *Statement of PO McDermott*

On August 21, 2024, PO McDermott provided a statement to the CCRB (**BR 06**).

On the date and time of incident, PO McDermott, PO Cekic, and Sgt. Taveras were patrolling the area near Lenox Avenue and West 143rd Street. There was no specific reason that brought them to this location. PO McDermott was seated in the rear passenger seat of an unmarked grey or black sedan, with PO Cekic driving and Sgt. Taveras in the front passenger seat.

While patrolling northbound, PO McDermott first observed § 87(2)(b) and a small group of friends walking southbound from West 143rd Street on Lenox Avenue. Although PO McDermott could not recall exactly what § 87(2)(b) was wearing, he remembered that § 87(2)(b) had on a "hoodie with a hoodie pocket." He also could not recall if § 87(2)(b) was holding anything in his hand. PO McDermott was approximately 15 to 20 feet away when he first noticed § 87(2)(b) walking past a group of officers on foot patrol at West 143rd Street and Lenox. PO McDermott's attention was drawn to § 87(2)(b) because, as he walked by the officers, he adjusted his waistband on the right side and cupped the waist area of his hoodie pocket. PO McDermott described "cupping" as using two hands to grasp an area, which led him to believe that § 87(2)(b) might be carrying a weapon. However, when § 87(2)(b) made this gesture, PO McDermott could not determine the shape of any object and further noted that he was not able to identify anything specific.

As § 87(2)(b) walked past the officers, he repeatedly glanced over his shoulder to see if they were watching him, all while continuing to adjust his waistband area. PO McDermott observed § 87(2)(b) doing this several times and described his actions as "weird movements." Additionally, PO McDermott noticed a bulge in the front portion of § 87(2)(b) waistband. He stated, "You could see kind of a flat line, similar to the slide of [a gun.]" PO McDermott suspected that the bulge might

be a weapon, either in the front of § 87(2)(b) waistband or the bottom pocket of his hoodie, as § 87(2)(b) was adjusting and cupping both areas. Initially, PO McDermott could not approximate the size of the bulge, but his representative later suggested it was about 5 to 6 inches, which PO McDermott agreed was a fair estimate. By this point, PO McDermott suspected that § 87(2)(b) was concealing a firearm, the bulge to be a firearm because the shape is similar to the slot that we have as well as his adjustments.

As § 87(2)(b) continued making "weird movements," he turned left onto West 142nd Street. At some point, the officers made a U-turn on Lenox Avenue at West 143rd Street to follow him and also turned left onto West 142nd Street. PO McDermott, seated in the back seat, was able to turn around and keep sight of § 87(2)(b) during this time. About 4 to 5 car lengths from the corner of West 142nd Street and Lenox Avenue, § 87(2)(b) stopped behind a car while his friends continued walking about 15 to 20 feet ahead. § 87(2)(b) stood behind the car for a few minutes, adjusting his clothing. PO McDermott observed § 87(2)(b) arm movements through the un-tinted window, but he could not see the object § 87(2)(b) was handling. PO McDermott believed § 87(2)(b) was using the car for cover. Meanwhile, § 87(2)(b) friends, who were about 15 feet away, stopped and waited for him. After standing behind the car for a short while, § 87(2)(b) rejoined his group, speed walking to catch up with them about a minute later, from the same direction they had originally come.

PO McDermott does not recall who radioed PO Infanzon or PO Damalio, who were posted at West 143rd Street and Lenox Avenue. However, he remembers that an officer inside of his vehicle asked PO Infanzon and PO Damalio to stop § 87(2)(b) based on their observations. PO McDermott recalled saying, "We said, this is the guy we're looking at. Stop him, because we're right behind you." An officer identified § 87(2)(b) by his clothing, and PO McDermott noted that no mention of § 87(2)(b) race or gender was given in the description, only what he was wearing.

After PO McDermott exited the vehicle, he observed § 87(2)(b) standing with a group of officers. PO McDermott did not recall what PO Infanzon and PO Damalio were doing when he approached but believed that PO Damalio was standing next to § 87(2)(b). PO McDermott also could not recall whether PO Infanzon or PO Damalio frisked or searched § 87(2)(b). As PO McDermott got closer, his observation of the bulge in § 87(2)(b) clothing did not change. However, he later stated that he could not remember if his observations had changed. He did not focus on § 87(2)(b) waistband area because, upon approaching, he noticed that § 87(2)(b) appeared irate. While PO McDermott did not recall exactly what § 87(2)(b) said, he described the language as vulgar and noted that § 87(2)(b) was flailing his arms. Due to § 87(2)(b) arm movements, PO McDermott did not focus on the area where he had initially observed the bulge, which he believed could be concealing a firearm. PO McDermott frisked § 87(2)(b) waistband and the backside of his body. He focused on these areas because, when § 87(2)(b) moved behind the vehicle, PO McDermott suspected he might be adjusting or moving a firearm. However, during the frisk, PO McDermott did not feel anything, and to his knowledge, there was no object in § 87(2)(b) pockets.

PO McDermott does not recall whether he searched § 87(2)(b). To refresh his memory, the investigation played a portion of PO Damalio's BWC, from 00:22 to 00:44. After viewing the video, PO McDermott stated, "In the video, it looks like my hand is going to the front pocket, but not to actually search him. If I'm searching the individual, I'm going into the pockets. It looks like I'm just trying to control the individual." He clarified that his intention was not to search § 87(2)(b) but to maintain control, as § 87(2)(b) had become irate and physically aggressive. PO McDermott stated that his hands went into § 87(2)(b) pockets to prevent him from moving away, explaining that officers sometimes hold a person's belt loop or pants in similar situations. PO McDermott felt it

was necessary to get close to § 87(2)(b) to prevent further escalation due to his behavior.

### *Documentary Evidence*

The investigation obtained a stop report related to this incident (**BR 04**). The report, which was completed by PO McDermott, notes that § 87(2)(b) was stopped on suspicion of criminal possession of a weapon. In the narrative regarding the circumstances that led to the stop, PO McDermott wrote: “At [time and place of occurrence], officers observed individual walking [southbound] on Lenox Avenue, as individual walked past other officers stationed close by on foot, individual adjusted his waistband and looked to have an object in the shape of a firearm in his front hoodie pocket and causing it to be weighed down. Officer continued to observe individual and watch as listed individual adjusted area near his front hoodie pocket several more times. Furthermore, as listed individual made a left onto West 142<sup>nd</sup> Street [between] Lenox and 5<sup>th</sup> individual spotted officers watching him and attempted to use the cars parked as cover and obscure the officer[’s] view of the heavily weighed object; individual then proceeded to walk back towards Lenox Avenue where individual was stopped. Upon further investigation, it was discovered that the object weighing his hoodie down was the individual’s cellphone.” PO McDermott noted that he observed § 87(2)(b) for three minutes prior to conducting the stop.

In addition, the “Endorsement History” section on page 2 of the stop report indicates that an earlier version of the stop report, also completed by PO McDermott, was submitted to and rejected by SGT Herrera several hours earlier because additional information was needed in the report narrative and the narrative did not provide a sufficient basis for the stop or a sufficient basis for the frisk (**BR 04**). On May 21, 2024, the investigation requested the original version of the stop report that was rejected by SGT Herrera; however, the NYPD refused to provide this earlier version (**BR 05**).

### *Rules*

According to *People v. De Bour*, 40 N.Y.2d 210 (N.Y. 1976), a civilian is considered stopped when a reasonable person would not feel free to disregard an officer and walk away, even without the threat of physical force (**BR 16**). Police officers must have an individualized reasonable suspicion that a person has committed or is about to commit a felony or misdemeanor in order to stop said person. “[I]nnocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand.” *De Bour*, 40 N.Y.2d at 216.

In accordance with *De Bour*, *NYPD Patrol Guide Procedure 212-11* (**BR 18**) states that during a Level 3 stop, a person is detained while an investigation is conducted to determine if there is probable cause to arrest the person. The officer must have a particularized and objective basis for suspecting the person of a crime and must be able to articulate specific facts establishing justification for the stop.

Under *PG 212-11* and *People v. DeBour*, 40 N.Y.2d 210 (1976), a frisk is only authorized when the member of the service reasonably suspects the person is armed and dangerous. This includes situations in which the officer reasonably suspects that the person has committed, is committing, or is about to commit a violent crime or when the officer observes something on the person that she/he reasonably suspects is a weapon. A frisk may not be conducted to discover evidence or the proceeds or instrumentalities of a crime (**BR 16, BR 18**).

Determining whether a stop and/or frisk is supported by reasonable suspicion requires "look[ing] at

the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (**BR 19**). While the totality of the circumstances is evaluated "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training, . . . [r]easonable suspicion does not mean simply accepting whatever circumstances are offered by the government as necessarily demonstrating sufficient grounds to suspect legal wrongdoing." *United States v. Freeman*, 735 F.3d 92, 103 (2d Cir. 2013) (**BR 20**).

While observation of a bulge may in certain circumstances give rise to reasonable suspicion that a civilian is armed, *De Bour* notes that "[t]he location of the bulge is noteworthy because unlike a pocket bulge which could be caused by any number of innocuous objects, a waistband bulge is telltale of a weapon" 40 N.Y.2d at 221 (**BR 16**). In *People v. Taveras*, 155 A.D.2d 131 (1st Dep't 1990) the court noted that "undefinable pocket bulges are not considered to be sufficient predicate for a frisk or search for a revolver, although defined bulges in the outline or configuration of a gun do warrant a frisk" (**BR 21**).

In addition, *Floyd v. City of New York* held that "[t]he outline of a commonly carried object such as a wallet or cell phone does not justify a stop or frisk" and that a cell phone in a stopped civilian's jacket pocket did not create a "suspicious bulge." 959 F.Supp.2d 540, 614, 631 n.489 (S.D.N.Y. 2013) (**BR 17**). *Floyd* also held that (i) an individual making eye contact with an officer, having an unidentified pocket bulge and "blading" his body in order to protect something in his right waist area that was preventing him from taking normal steps was "insufficient to form a reasonable, particularized suspicion;" (ii) an individual walking with his hands in his pockets in a high crime area and "standing between two parked cars" was "a far cry from the *individualized* suspicion of wrongdoing that constitutes reasonable suspicion;" and (iii) an individual's alleged "furtive movements — looking over his shoulder and jaywalking — [] does not establish the requisite individualized suspicion that [the individual] was engaged in criminal activity." *Id.* at 630-33, 640-41 (**BR 17**).

In *People v. Crawford*, the N.Y. State Appellate Division's First Department held that officers' observation of an individual clutching and pulling up three or four times on their pocket which contained an unidentified heavy bulge did not "raise a reasonable suspicion that he had a gun or was otherwise involved in a crime." 89 A.D.3d 422, 422-23 (1st Dep't 2011) (**BR 50**).

In *People v. Gerard*, the New York State Appellate Division's First Department held that even the combination of a "defendant's change in course when he noticed the police officers," his "act of blading his body towards the wall as the investigating officer neared," and "the bulge in the defendant's weighted down pocket" only established "founded suspicion that criminality was afoot" for a Level 2 "common law right of inquiry" but did not establish reasonable suspicion for a Level 3 *Terry* stop and/or frisk. 94 A.D.3d 592, 592-93 (1st Dep't 2012) (**BR 51**).

Lastly, an officer may only conduct a non-consensual search of the interior of a civilian's clothing during an investigative street encounter under two circumstances. First, such search is permissible if the officer has probable cause to believe that the person is in possession of an illegal weapon, contraband, or other evidence of a crime. *See People v. McNatt*, 65 N.Y.2d 1046, 1048 (1985); *In re Andy E*, 81 N.Y.2d 948, 949 (1993) (**BR 24, BR 25**). Second, under *Patrol Guide Procedure 212-11*, a search occurs when the officer places her/his hands inside a pocket or other interior portions of a person's clothing or personal property to remove an object that the member felt during a frisk, and such search is only permissible where the member of the service reasonably suspects that the object felt during the frisk may be a weapon (**BR 18**).



### Analysis and Recommendation

It is undisputed that PO McDermott conducted a Level 3 stop and a frisk of § 87(2)(b). PO McDermott provided the following reasons for the stop: (1) § 87(2)(b) repeatedly adjusted his waistband on the right side and cupped the waist area of his hoodie pocket; (2) he repeatedly glanced over his shoulder to see if officer that were on patrol were watching him; (3) he noticed a bulge in the front right portion of § 87(2)(b) waistband consistent to the slide of a gun; and (4) he stopped behind a parked vehicle and continued to adjust his waistband.

§ 87(2)(g)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)

§ 87(2)(g)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)

After PO McDermott frisked § 87(2)(b) he placed his hands in § 87(2)(b) front pockets,

§ 87(2)(g)  
§ 87(2)(b)  
After reviewing PO Damalio's BWC with the investigation, PO McDermott stated, "In the video, it looks like my hand is going to the front pocket, but not to actually search him. If I'm searching the individual, I'm going into the pockets. It looks like I'm just trying to control the individual." § 87(2)(g)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)

§ 87(2)(g)  
§ 87(2)(b) it is clear from the BWC footage that he searches at least one of § 87(2)(b) pockets by placing at least one finger inside to discern the contents of the pocket § 87(2)(g)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)  
§ 87(2)(b)

*NYPD Patrol Guide Procedure 212-11* only permits an officer to enter a stopped person's pocket to retrieve an object felt during a frisk if the officer reasonably believes that the object is a weapon (**BR 18**). Still photographs show that, despite PO McDermott's claims in the Stop Report, there is no weighted object in § 87(2)(b) hooded sweatshirt pocket or pants or any visible indication that § 87(2)(b) might be in possession of a weapon, an item that resembled a weapon, or any other item of significant bulk or heft (**BR 42**). § 87(2)(g)  
§ 87(2)(b)  
§ 87(2)(b)

§ 87(2)(g)

**Allegation (D) Force: An officer used physical force against § 87(2)(b)**

As noted above in the discussion of Allegations A-C, § 87(2)(b) alleged that as he attempted to move away from the frisk and search, an officer he described as a light-skinned male officer hit his left hip with a palm or fist, so § 87(2)(b) stopped resisting (BR 02). However, a review of the BWC files failed to identify any officer performing this action § 87(2)(g)

**Allegation (E) Abuse of Authority: Police Officer Kevin McDermott detained § 87(2)(b)**

**Allegation (F) Abuse of Authority: Police Officer Kevin McDermott failed to explain to § 87(2)(b) the reason for a law enforcement activity.**

§ 87(2)(b) *Statement*

After § 87(2)(b) was frisked and searched, he told the officers to let him go and stated that he was not trying to talk to them. PO McDermott asked him for his ID. § 87(2)(b) told him he had no ID since he was a student and it was the summer, so he had no school ID. PO McDermott asked for his name and date of birth, which he provided. PO McDermott checked the information on some sort of black device that was similar in shape and size as a phone but did not appear to be one. Once PO McDermott verified § 87(2)(b) was a youth, he looked “dumbfounded and confused.” PO McDermott gave § 87(2)(b) a business card and verbally provided his shield number. The officers then walked back to the corner (BR 02).

*BWC Video Evidence*

PO McDermott’s BWC (BR 14) shows that after his frisk and search of § 87(2)(b) concluded at 1:06 minutes in the recording, § 87(2)(b) asks PO McDermott to unhand him. § 87(2)(b) then tries to walk away. PO McDermott holds on to § 87(2)(b) clothing and says, “Get off me, stupid.” PO McDermott tells § 87(2)(b) to relax and releases § 87(2)(b) clothing. As § 87(2)(b) walks away, PO McDermott asks, “You want us to explain why we’re stopping you?” and “You want a business card?” An unidentified officer prevents § 87(2)(b) from leaving by holding his clothing. PO McDermott adds, “We’re trying to explain you the stop” at 1:24 minutes. § 87(2)(b) then ceases his attempts to walk away. PO McDermott says, “You want to listen?” and § 87(2)(b) exclaims, “Talk.” Instead of providing any information about the reason for the stop, PO McDermott asks, “What’s your name, man?” § 87(2)(b) says, “I’m listening.” PO McDermott says, “You got ID?” § 87(2)(b) says, “I’m listening.” PO McDermott does not provide an explanation and says, “We just want to see who you are. We just want to know who we’re talking to.” § 87(2)(b) takes a step away from the officers and PO McDermott grabs § 87(2)(b) arm. § 87(2)(b) responds, “Nice to meet you” and moves his hand as if to shake hands with PO McDermott. PO McDermott repeats, “I just want to see who I am talking to.” As he says this, he maintains his grasp on § 87(2)(b) arm. § 87(2)(b) repeatedly exclaims, “Let go of me!” PO McDermott says, “You have some ID?” During this exchange, other officers have encircled § 87(2)(b) standing within one or two feet of him. At 2:06 minutes, PO Damalio takes his Department-issued cell phone out of his pocket and hands it to PO McDermott. At 2:28 minutes, while officers are still encircling § 87(2)(b) PO McDermott asks § 87(2)(b) how old he is, to which he replies “16,” and then asks § 87(2)(b) for his first and last name, which § 87(2)(b) verbally provides. In the background,

§ 87(2)(b) companions can be heard asking officers why they were stopping § 87(2)(b) PO McDermott never provides § 87(2)(b) with an explanation for the stop.

PO Williams' BWC (**BR 13**) shows the same interaction from a different angle. At 2:06 minutes of the video, PO Damalio can be seen handing PO McDermott his cell phone. At 2:28-2:42 minutes (time of day 8:18pm), PO McDermott can be seen and heard asking § 87(2)(b) how old he is and for his first and last name, and, as § 87(2)(b) verbally responds to each of these questions, PO McDermott can be seen typing information into the cell phone that PO Damalio had handed him.

#### *PO McDermott's CCRB Statement*

PO McDermott stated that he initially tried to explain the reason for the stop, but § 87(2)(b) was too irate, making it difficult to have a conversation at that moment. When § 87(2)(b) attempted to leave, PO McDermott stopped him by grabbing his hoodie, specifically by the sleeve. PO McDermott could not recall whether he asked § 87(2)(b) for his ID, name, or other personal information, but he believed that § 87(2)(b) provided the information verbally. PO McDermott asked for § 87(2)(b) name for the stop report. When questioned if a name is required for the report, he responded that he was not sure, but explained, "You're supposed to put basic pedigree information, like first name, last name, date of birth, height, weight, and things of that nature." He later mentioned that he asked § 87(2)(b) for his age, which § 87(2)(b) provided, though PO McDermott could not recall the exact age. When asked why he inquired about § 87(2)(b) age, PO McDermott said, "just to ask." He also did not recall if he conducted any electronic searches. At the time he asked for § 87(2)(b) ID, PO McDermott did not believe that § 87(2)(b) was concealing a weapon.

#### *Documentary Evidence*

PO McDermott completed Stop Report STP-§ 87(2)(b) regarding the stop of § 87(2)(b). In the section titled "Person Stopped," there is no field for officers to include the name of the stopped individual. There is no other field in the report that asks for the name of a stopped individual, nor does § 87(2)(b) name appear anywhere on the form (**BR 04**).

The investigation also received confirmation that a warrant audit check for § 87(2)(b) was conducted from PO Damalio's Department-issued cell phone on June 18, 2023 at 8:18pm (**BR 07**).

#### *Rules*

New York City Administrative Code 14-174 requires officers undertaking certain law enforcement activity including the noncustodial questioning of individuals suspected of criminal activity, frisks, and searches, to "provide to such person an explanation of the reason for such law enforcement activity, unless providing such information would impair a criminal investigation" (**BR 43**). Similarly, *Patrol Guide Procedure 212-11* requires that a Member of Service conducting a Level 3 Terry stop "provide the individual with an explanation for the encounter, unless providing such information would impair a criminal investigation." (**BR 18**).

An investigative *Terry* stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (**BR 52**). Specifically, the stop must be "no longer in duration than necessary to confirm or dispel officers' reasonable suspicions." *United States v. Patterson*, 25 F.4<sup>th</sup> 123, 141 (2d Cir. 2022) (**BR 53**). Similarly, *Patrol Guide Procedure 212-11* states that a "suspect may be detained only as long as necessary to confirm or dispel [the officer's] suspicion that she/he was committing, committed, or was about to commit a felony or Penal

Law misdemeanor.” (BR 18).

In December 2022, the City of New York agreed to a settlement in *Terron Belle et. al. v. the City of New York*, a 2019 class action lawsuit that challenged the NYPD’s practice of unnecessarily prolonging a stop to request identification and conduct warrant checks in the absence of reasonable suspicion to justify an extension of the detention (BR 44, BR 49).

As a result of the settlement, on December 9, 2022, the NYPD released a Finest Message (Ser. # 42304245), which was distributed to all commands, to alert officers to amendments to *Patrol Guide Procedure 208-22* regarding warrant checks (BR 45). The Finest Message notes that “Once reasonable suspicion is established, the suspect may only be detained as long as necessary to confirm or dispel suspicion. The authority to detain a suspect ends when the task related to the reason(s) for the stop are completed or reasonably should have been completed, and that person may no longer be detained for the purpose of searching for a warrant or investigation card.” A notation directed Commanding Officers to ensure that all members of their commands were apprised of the message contents, and that the Finest message was to be read at every command for ten consecutive days.

*Patrol Guide Procedure 208-22*, which went into effect on October 26, 2022, states that “[a]uthority to detain a suspect ends when the tasks tied to the reason for the stop are completed or reasonably should have been completed. Once tasks tied to the reason for the stop are completed or reasonably should have been completed, a person may not continue to be detained to search for a warrant.” (BR 46).

#### *Analysis and Recommendation*

§ 87(2)(g)

The BWC footage shows that when § 87(2)(b) tried to walk away from the police encounter after he had been frisked and searched, PO McDermott physically prevented § 87(2)(b) from leaving by grasping his clothing (BR 14). Further, as § 87(2)(b) attempted to leave and protested his further detention, PO McDermott repeatedly told § 87(2)(b) that he intended to provide an explanation for the stop. However, instead of providing such an explanation, PO McDermott repeatedly asked § 87(2)(b) for his identification and then asked him for his first and last name and age, which § 87(2)(b) verbally provided and which PO McDermott inputted into PO Damalio’s Department-issued cell phone (BR 13, BR 14). § 87(2)(g)

PO McDermott stated that he requested § 87(2)(b) identifying information to gather information for the Stop Report. § 87(2)(g)

However, as discussed above, the Stop Report does not require that officers enter the name of a stopped individual, and PO McDermott did not use § 87(2)(b) name anywhere in the stop report that he did complete (BR 04). Instead, as indicated by the warrant check that was run on § 87(2)(b) from PO Damalio’s phone (BR 07) at the exact same date and time (June 18, 2023 at 8:18pm) that PO McDermott entered § 87(2)(b) identifying information into PO Damalio’s phone (BR 13), § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation (G) Abuse of Authority: Police Officer Kevin McDermott took law enforcement action based upon actual or perceived race.**

§ 87(2)(b) stated he believed the interaction was racially motivated. His provided three bases for this belief: he did not believe that the officers stopped him for a good reason; he believed that the officers were more aggressive than necessary; and there was only one black officer in the group, and only white officers stopped and frisked him.

*NYPD Administrative Guide Section 304-17* defines racial profiling as “a decision to initiate [law] enforcement action against a person [that] is motivated even in part by a person’s actual or perceived race, color, ethnicity or national origin, . . . unless the officer’s decision is based on a specific and reliable suspect description that includes not just race, age, and gender, but other identifying characteristics or information” (BR 26).

Race does not have to be the sole, primary, or predominant motivation for the law enforcement action in question in order to substantiate an allegation of racially biased policing. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)); *United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996); *Floyd v. City of New York*, 959 F.Supp.2d 540, 571 (S.D.N.Y. 2013). If the preponderance of the evidence establishes that the civilian’s race played any role in the officer’s decision making, the racial profiling allegation should be substantiated, regardless of any non-discriminatory reasons the officer gives for their actions. *Yonkers*, 96 F.3d at 612 ; *Raza v. City of New York*, 998 F.Supp.2d 70, 79-80 (E.D.N.Y. 2013); *Bennett v. Health Sys., Inc.*, 92 A.D.3d 29, 40 (1st Dep’t 2011). Thus, a law enforcement action that is otherwise legally justified (e.g., a vehicle stop supported by probable cause of a traffic violation) can still constitute racial profiling if the officer was motivated at least in part to take the action by the civilian’s actual or perceived race. *See PBA v.*



*City of N.Y.*, 142 A.D.3d 53, 66-67 (1st Dep’t 2016); *Raza*, 998 F.Supp.2d at 79; *Floyd*, 959 F.Supp.2d at 667 (**BR 27**).

A finding of racially discriminatory motivation can be based on direct or circumstantial evidence. *Gatling v. West*, 850 Fed.App’x. 91, 97 (2d Cir. 2021).; *Millan-Hernandez v. Barr*, 965 F.3d 140, 148 (2d Cir. 2020); *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40-41 (1st Dep’t 2011). Direct evidence includes evidence that “a decision relies expressly on [the civilian’s] protected characteristic,” as well as conduct or statements “directly reflecting [the officer’s] discriminatory attitude” toward members of the civilian’s demographic group. See *Young v. UPS*, 575 U.S. 206, 213 (2015); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997).

The investigation uncovered no direct evidence of racial bias in this case, as there are no statements or video evidence suggesting that the officers use racially offensive language towards § 87(2)(b) during their interaction, and PO McDermott denied that § 87(2)(b) race was a factor in any of the actions they took during the incident. (**BR 28**)

However, because racially discriminatory intent “is rarely susceptible to direct proof,” it is often established through circumstantial evidence. *Millan-Hernandez v. Barr*, 965 F.3d 140, 148 (2d Cir. 2020) (**BR 28**) ; *Bennett*, 92 A.D.3d at 40-41 (**BR 28**). However, rarely is one piece of circumstantial evidence sufficient on its own to establish racially discriminatory intent. The factfinder must instead consider the “totality of the relevant facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976) (**BR 29**); *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (**BR 30**). Examples of circumstantial evidence to consider include, but are not limited to:

- i. *the sequence of events leading up to the law enforcement actions at issue;*
  - ii. *the falsity, implausibility, and/or vagueness of the officer’s non-discriminatory explanations for their actions;*
  - iii. *officer’s violation of law and/or department policies and procedures during the incident in question;*
  - iv. *officer’s history of prior biased acts or similar misconduct committed against persons from the complainant/victim’s racial/ethnic group; and*
  - v. *data showing racial disparities in the officer’s enforcement activity over time.*
- 
- i. *the sequence of events leading up to the law enforcement actions at issue*

The United States Supreme Court has held that when analyzing claims of racial discrimination, “[t]he specific sequence of events leading up to the challenged decision [] may shed some light on the decisionmaker’s purposes.” *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. at 267 (**BR 27**). Thus, the events leading up to a challenged law enforcement action, including evidence that an officer knew an individual’s race before taking law enforcement action against the individual, can, in combination with other circumstantial evidence, support an inference that the individual’s race may have played a role in the officer’s decision to take such action. *Ballew v. City of Pasadena*, 642 F.Supp.3d 1146, 1165 (C.D. Cal 2022) (**BR 31**); *Commonwealth v. Long*, 152 N.E.3d 733, 739-40 (Mass. 2020) (**BR 32**); *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1169 (10th Cir. 2003) (**BR 33**).

As discussed under Allegations A-B, the officers’ decision to stop § 87(2)(b) was based upon PO McDermott’s observations. PO McDermott stated that when he first had suspicions about § 87(2)(b), he was in a vehicle approximately 15-20 feet away. After this initial observation, he continued to follow § 87(2)(b) until he told PO Infanzon to stop § 87(2)(b) during which time PO McDermott had a clear and unobstructed view of § 87(2)(b) face. Further, as reflected

in officers' BWC's, this incident took place during daylight hours.

§ 87(2)(g)

ii. *falsity of the officer's non-discriminatory explanations for their actions*

The falsity of a law enforcement officer's race neutral explanation for their actions can also support a finding that the officer was trying to conceal a discriminatory motive. *Turkmen v. Hasty*, 789 F.3d 218, 256-57 (2d Cir. 2015), *rev'd on other grounds*, 137 S.Ct. 1843 (2017) (**BR 34**); *Rodriguez v. Barr*, 943 F.3d 134, 143 (2d Cir. 2019) (**BR 35**).

§ 87(2)(g)

For example, as discussed in Allegations A-B, PO McDermott's statement that he observed an approximately five-inch bulge in the front of § 87(2)(b) waistband, and that this bulge resembled the shape of a gun is contradicted by the officers' BWC footage of the stop and the fact that the frisk and search of § 87(2)(b) yielded only a cell phone. In addition, as discussed in Allegation C, PO McDermott's explanation for putting his hand inside of § 87(2)(b) front jeans pocket – that he did so to control § 87(2)(b) who was acting irate, and not to search the contents of the pocket – is contradicted by PO Damalio's BWC (**BR 15**). Lastly, as discussed in Allegation E, PO McDermott's explanation for why he continued § 87(2)(b) detention after the frisk and search to obtain his personal identifying information – that he needed the information for the stop report – is contradicted by the stop report itself, which does not contain that information or even a place to record that information (**BR 04**).

§ 87(2)(g)

iii. *Officer's violations of law and/or police department policy*

The fact that a law enforcement action was taken in violation of the law (e.g., investigatory stops and frisks without reasonable suspicion, searches conducted without probable cause, etc.) can, in combination with other circumstantial evidence, also support a finding that such action was racially motivated. *Rodriguez v. Barr*, 943 F.3d at 143 (**BR 35**); *Millan-Hernandez v. Barr*, 965 F.3d at 148 (**BR 23**); *Hassan v. City of N.Y.*, 804 F.3d 277, 296 n.7 (3d Cir. 2015) (**BR 36**). Similarly, actions taken in violation of police department policy may suggest that the subject officer acted with a discriminatory purpose. *See Rodriguez*, 943 F.3d at 142 (**BR 35**); *Commonwealth v. Long*, 152 N.E.3d at 740 n.12 (**BR 32**).

§ 87(2)(g)

"[T]he lack of adequate suspicion" in combination with other circumstantial evidence can support "a reasonable inference that [the police officer] acted, at least in part" because of the civilian's race. *Anderson v. Cornejo*, 284 F.Supp.2d 1008, 1055 (N.D. Ill. 2003) (**BR 37**); *see also Hassan v. City of N.Y.*, 804 F.3d 277, 296 (3d Cir. 2015) (noting that "the lack of adequate reasonable suspicion... is certainly one factor that they may be considered by the finder of fact" when analyzing a biased policing allegation) (**BR 36**).

In addition, as discussed in Allegation E, PO McDermott's continued detention of § 87(2)(b) to run a warrant check § 87(2)(g) was unrelated to his purported reason he stopped § 87(2)(b) in the first place (suspicion of weapons possession). Officer conduct that is inconsistent with the original purpose of the stop can itself be circumstantial evidence of the officer's improper racial motives for said stop. *See Commonwealth v. Long*, 152 N.E.3d at 740, n.10 (**BR 32**).

§ 87(2)(g)

*iv. Officer's history of prior biased acts or similar misconduct committed against persons from the complainant / victim's racial / ethnic group*

"Proof of prior discriminatory conduct" by an alleged discriminator against members of the complainant's demographic group "is relevant to their motive and intent at the time of the acts at issue here," *Open Housing Ctr v. Kings Highway Realty*, 1993 U.S. Dist. LEXIS 15927, \*18-21 (E.D.N.Y. Nov. 8, 1993), especially if the prior conduct "is similar in nature to that experienced by the [complainant]." *Zubulake v. UBS Warburg, LLC*, 382 F.Supp.2d 536, 544. (S.D.N.Y. 2005); *Todaro v. Siegel, Fenchel & Peddy, P.C.*, 2008 U.S. Dist. LEXIS 17894, \*13 (S.D.N.Y. Mar. 3, 2008) (**BR 38**).

The CCRB requested and received from PO McDermott's IAB profiling and EEO complaint histories, lawsuit histories, and Central Personnel Indexes. PO McDermott had no IAB profiling or EEO complaints. The NYPD also indicated that their search for adverse credibility determinations made against the subject officers returned no results. The investigation also uncovered no relevant evidence or patterns of conduct in evaluating PO McDermott's Central Personnel Indexes (**BR 40**, **BR 41**).

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*v. data showing racial disparities in the officer's enforcement activity over time.*

Data showing a pattern of racial disparities in a police officer's enforcement activity over time are widely recognized as important circumstantial evidence to consider in a "totality of the relevant facts" analysis of an allegation of racial profiling against that officer. *See, e.g., Marshall*, 345 F.3d at 1168; *Anderson v. Cornejo*, 284 F.Supp.2d at 1050 (**BR 37**); *Johnson v. Holmes*, 782 Fed.Appx. 269, 281-82 (4th Cir. 2019); *Long*, 152 N.E.3d at 739-40 (**BR 32**).

The investigation requested and received data from the NYPD on all Terry stops recorded and criminal summonses issued by PO McDermott and for all other officers in their commands for the year preceding the incident under investigation (**BR 47**). The RPBP Unit's Chief Data Scientist analyzed these data, and the results of her analyses are summarized in a memorandum attached to (**BR 09**). The results of her findings determined that PO McDermott completed only one stop report for a self-initiated stop during the aforementioned timeframe. This stop was of a Black male civilian, 15-19 years old. PO McDermott reported frisking the civilian but not searching him or finding contraband.

§ 87(2)(g)



§ 87(2)(g)

vi. *Summary of evidence and recommended disposition*

§ 87(2)(g)

**Civilian and Officer CCRB Histories**

- This is the first CCRB complaint to which § 87(2)(b) has been a party (**BR 39**).
- PO McDermott has been a member of service for four years and has been a subject in three CCRB complaints and four allegations, none of which were substantiated. § 87(2)(g)
- This complaint was not suitable for mediation.
- As of August 8, 2024, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this incident (**BR 08**).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Squad No.: RPBP 1

Investigator:	<u>Delali Madison</u> Signature	<u>Inv. Atty. Fellow Delali Madison</u> Print Title & Name	<u>September 23, 2024</u> Date
Squad Leader:	<u>Carlmais Johnson</u> Signature	<u>IM Carlmais Johnson</u> Print Title & Name	<u>October 1, 2024</u> Date
Reviewer:	<u>Darius Charney</u> Signature	<u>RPBP Dir. Darius Charney</u> Print Title & Name	<u>October 1, 2024</u> Date